84-416

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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

KATHRYN MAE SWISHER, Petitioner,

vs.

STATE OF TENNESSEE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
CRIMINAL COURT OF APPEALS FOR TENNESSEE

JOHN C. DICE
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June 23, 1984

QUESTIONS PRESENTED

1. Whether the Trial Court should have recused itself from hearing contempt charges against the petitioner herein because of the Trial Court's view that the alleged contemptuous actions involved disrespect to or criticism of the Trial Court, and whether failure of the Trial Court to do so denied the petitioner herein due process under the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the Trial Court's failure to give the petitioner due notice of the charges against her deprived her of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States, and whether an evidentiary hearing should have been held in this matter rather than a summary disposition of the alleged charges.

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I. The Court erred in not disqualifying himself from hearing this matter where the Court alleged that the defendant's contemptuous behavior involved disrespect of the Trial Judge under Rule 42, Tennessee Rules of Criminal Procedure, and the petitioner was thereby denied her due process of law rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

II. The petitioner was denied her right to a fair trial in that she was not notified, prior to the date of the hearing on June 7, 1983, of all the charges on which the Court was going to proceed.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

KATHRYN MAE SWISHER,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner Kathryn Mae Swisher, by and through her attorneys of record, respectfully prays that a Writ of Certiorari issue to review

the judgment of the Supreme Court of Tennessee affirming her sentence of contempt of court. The said sentence was incarceration for a period of ten (10) days, with the Court suspending eight (8) days, and a fine of fifty (50) dollars.

OPINION BELOW

The Order of the Supreme Court of Tennessee denying petitioner's Application for Permission to Appeal is attached as Appendix A. That Order was filed on June 4, 1984, and the denial of her application left in effect the opinion filed by the Court of Criminal Appeals of Tennessee, filed on March 15, 1984, said opinion being attached as Appendix B.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3). The judgment of the Supreme Court of Tennessee was entered on June 4, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in relevant part:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment provides in relevant part:

"Nor be deprived of life, liberty, or property, without due process of law.

Rule 42, Criminal Contempt:

(a) Summary Disposition.-A criminal contempt may be punished summarily if the Judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the Judge and entered of record.

(b) Disposition upon Notice and Hearing.-A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts

constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the Judge in open Court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the Court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a Judge, that Judge is disqualified from presiding at the hearing except with the defendant's consent. Upon a verdict of finding of guilt the Court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

On May 24, 1983, in the criminal trial of State of Tennessee vs. Herman Samuel Phillips, Shelby County Indictment Nos. 89571-72, the petitioner was engaged as defense attorney. On that day, and during the course of said trial, the Court, the Honorable W. Fred Axley presiding, admonished petitioner to cease talking to the Court during the time the Court was ruling on objections.

Also, at one point in said trial, the Court declared a recess. Recess having been declared, the Attorney General for the State of Tennessee left the Court, and the jury also was leaving the courtroom. But, before the jurors had vacated the courtroom, the petitioner was heard to ask her client how tall he was and the petitioner's client responded. The petitioner was unaware of the presence of the remaining jurors. The Court then notified the petitioner that a Contempt of Court hearing would be held,

deferring said hearing until conclusion of the trial then preceding before the Court. The Court announced that it would give the petitioner a date for said hearing at a later time and that she would be entitled to be represented at that hearing.

The above-referred-to hearing was conducted before the Trial Judge on June 7, 1983, pursuant to an Order entered May 26, 1983. At the hearing, the Court notified the petitioner of "what the Court had found to be contemptuous in [her] manners and proceedings in the trial that I have just alluded to on the record." (Appendix C, page 1) The Court then went on to enumerate three (3) items which it found to be the contemptuous conduct. These acts are summarized here for brevity:

1. Continuation of talking while the Court was ruling on objections.

2. The asking of her client his height in the presence of the jury, referred to above.

3. An allegation that, during the rebuttal argument to the jury by the Assistant District Attorney General, the petitioner made several hand signals to the jury consisting of two (2) separate acts. First, "one of which was to place the thumb and first finger together in a circle with the other three (3) extended straight up . . . ." Second, that "at one point [she] actually arose to [her] feet, stood silent for several seconds, with [her] arms extended from [her] side as if in a crucifixion stance." (Appendix C, page 3)

A record of the Contempt Hearing is attached to this petition as Appendix C. In ruling on the petitioner's alleged conduct, the Court held as follows: "I do address myself to the conduct of lawyers in this courtroom. This Court commands respect. I will get it from lawyers one way or another. They may try me out from time to time. The consequences are up to them." (Appendix C, page 5)

Having made that statement, the Court ordered the petitioner incarcerated in the Shelby County jail for ten (10) days, suspended two (2) of those days, and fined her fifty (50) dollars.

A partial transcript of the trial record is attached to this petition as Appendix D. Clearly shown in that transcript is that the Court had recessed. (Appendix D, page 6) Further, the transcript reveals that the Assistant Attorney General for the State of Tennessee, because the Court was in recess, had left the courtroom. (Appendix D, page 6)

Also, it was at that time that the Trial Court, at least as to this conduct, stated that he was going to "defer to the end of this Trial a Contempt of Court." (Appendix D, page 7)

The Court admonished the petitioner herein that she was "supposed to be looking at the jury." (Appendix D, page 8)

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner alleged in her Brief filed before the Court of Criminal Appeals of the State of Tennessee and in her Application for Permission to Appeal filed before the Supreme Court of the State of Tennessee the grounds cited herein. Specifically, those issues were raised as issues one (1) and two (2) in both Courts as follows:

1. Whether the Trial Court erred in not following the procedures established by Rule 42, Tennessee Rules of Criminal Procedure, and whether the failure of the trial Court to follow Rule 42 procedures denied the Defendant her due process of law rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and by Article 1, Sections 8

and 9, of the Constitution of the State of Tennessee.

2. Whether the trial Court erred in not disqualifying himself from hearing this matter, where the Court alleged that the Defendant's contemptuous behavior involved disrespect of the Trial Judge under Rule 42, Tennessee Rules of Criminal Procedure, and whether the Defendant was thereby denied her due process of law rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 1, Sections 8 and 9 of the Constitution of the State of Tennessee.

Both issues were decided adversely to the petitioner in the Criminal Court of Appeals of the State of Tennessee, and as stated hereinabove, the Tennessee Supreme Court did not grant her Application for Permission to Appeal.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this

Court should issue a Writ of Certiorari to review the decision of the Tennessee Supreme Court.

I. THE COURT ERRED IN NOT DISQUALIFYING HIMSELF FROM HEARING THIS MATTER, WHERE THE COURT ALLEGED THAT THE DEFENDANT'S CONTEMPTUOUS BEHAVIOR INVOLVED DISRESPECT OF THE TRIAL JUDGE UNDER RULE 42, TENNESSEE RULES OF CRIMINAL PROCEDURE, AND THE PETITIONER WAS THEREBY DENIED HER DUE PROCESS OF LAW RIGHTS AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION TO THE UNITED STATES.

The Court's failure to disqualify himself in this matter denied the petitioner a fair and impartial trial before a neutral and detached magistrate. It is obvious from the Court's remarks, cited in the Statement of the Case, supra, that the Court viewed the petitioner's alleged misconduct as being disrespectful to the Court. Petitioner would

respectfully urge that the test as to whether a Trial Court should sit in judgment of this type of case should be the appearance of the slightest hint of impropriety on the part of the Court. Rule 42 of the Tennessee Rules of Criminal Procedure parallels Rule 42 of the Federal Rules of Criminal Procedure. Petitioner would respectfully submit to the Court that the developing rule on the issue of whether a Trial Court should sit in judgment of an attorney whom it views as personally disrespectful, is, that it should not.

The trial Court's personal feelings were obviously involved. The Court characterized petitioner's alleged conduct as:

> "Possibly the worst example of an officer of this Court or any member of the bar that I have ever seen in my ten years of the practice of law."(Appendix D, page 7)

As was cautioned in Offut v. United States, 348 U.S. 11, 99 L. Ed. 11, 75 S. Ct. 11 (1954), Courts should not be:

> "Sitting themselves in Judgment upon misconduct of counsel where the contempt charged is entangled with the Judge's personal feelings against the lawyer."

In the case of United States v. Combs, 390 F.2d 426, 3 A.L.R. Fed. 410 (6th Cir. 1968), the Trial Court had viewed as personally disrespectful the actions of an attorney in filing affidavits asking the Court to recuse itself from hearing a condemnation case for the third time. Further, the trial Court found contemptuous the attorney's conduct in bringing a tape recorder to Court and taping the Motion for Recusal.

As noted in that case, there was no question that the Trial Court felt the contents of the filed affidavits were disrespectful to

the Court. The Court of Appeals reversed the case, noting that the Court's personal feelings were involved in the action, and that the Court should have disqualified itself. More important, the Court pointed out:

> "The disqualification provision of Rule 42 (b) was prompted by the common experience that uncommonly prejudiced individuals almost invariably consider themselves impartial and was based in part on the observations of Mr. Chief Justice Taft in Cooke v. United States (1925) 267 U.S. 517, 539, 69 L. Ed. 767, 775, 45 S. Ct. 390."

Briefly put, the question has to be whether the Judge is personally embroiled in the case which he is trying, and whether he is unbiased and impartial.

Petitioner would respectfully say to the Court that the Judge was not free from bias. Petitioner would further say that she knows of no duty for her to observe a jury, once the Court has declared recess, and would note that the Court evidently did not feel that this

standard of conduct applied to the Assistant Attorney General of the State of Tennessee, as that officer had left the courtroom.

The petitioner was being tried on criminal contempt charges, and respectfully asserts to this Court that proof of her actions must be shown beyond a reasonable doubt and to a moral certainty as being contemptuous. She would point out to the Court that there was no evidence provided in this matter that any of the jurors heard anything which transpired in the Court, nor that she intended her remark for their hearing. This again is a reason that the Trial Court should have recused himself. A fair and impartial evidentiary ;hearing should have been provided.

II. THE PETITIONER WAS DENIED HER RIGHT TO A FAIR TRIAL IN THAT SHE WAS NOT NOTIFIED, PRIOR TO THE DATE OF THE HEARING ON JUNE 7, 1983, OF ALL THE CHARGES ON WHICH THE COURT WAS GOING TO PROCEED.

As stated in an annotation by William Aiken, Jr., "Summary Contempt, Attorney" 58 A.L.R. Fed. 22 (1982):

> In order to punish a person for conduct considered by the Court to be contemptuous, the punishment must be imposed under Rule 42 (b) which requires prior notice and a hearing. 58 A.L.R. Fed 22, 28.

It is an elementary proposition of law that any defendant is entitled to proper notice of the charges pending against him. As is clearly shown in the record, attached as an Appendix to this Petition, the only conduct of the Petitioner as to which she may have had prior notice as being under the scrutiny of the Court for contempt was that of her statement to her client made while the Court was in recess.(Appendix D. page 7)

The United States Supreme Court in Taylor v. Hayes, 94 S. Ct. 2697, 2703, 418 U.S. 483, 489, 41 L. Ed.2d 897 (1974), states that "before an attorney is finally adjudicated in contempt and sentenced after trial for conduct

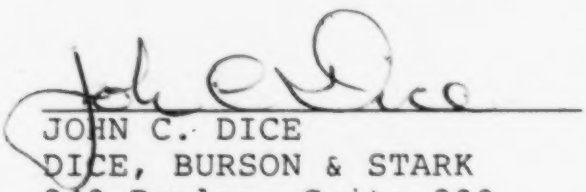
during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." The petitioner did not have this opportunity, as the Trial Judge did not present her with the required certification pursuant to Tennessee Rules of Criminal Procedure Rule 42 (a); therefore, she has been denied her due process rights in this case. More important, had she been granted an evidentiary hearing on these charges before a neutral and detached magistrate, jurors in the trial in which she was involved could have been called as witnesses or other parties to the trial itself could have been subpoenaed.

Petitioner respectfully contends that the Trial Judge inserted himself as an advocate in this cause by prejudging her case. The trial record attached herein clearly demonstrates that the Court believed that she would not place her client on the stand, although the trial had obviously not reached that point. The Court felt that petitioner's question of her client,

during the recess, was an improper attempt by her to introduce evidence. Petitioner would respectfully contend that the attitude of the Court, in this regard, demonstrates the lack of bias or impartially, which is needed for a Trial Judge to pronounce Petitioner's actions either as contemptuous or not contemptuous. This fact, once again, heightens the need for the Court to have recused himself.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Criminal Court of Appeals of the State of Tennessee below.



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June 28, 1984

APPENDIX A

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,

Plaintiff-Appellee,

v.

Shelby Criminal
C.C.A. No. 80

KATHRYN MAE SWISHER,

Defendant-Appellant.

ORDER

Upon consideration of the application for permission to appeal filed by the appellant and the answer of the appellee, the briefs of counsel and the entire record, the Court is of the opinion that the application should be and the same is hereby denied.

Costs will be borne by the appellant.

PER CURIAM

June 4, 1984

APPENDIX B

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

JACKSON, FEBRUARY 1984 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee	)	C.C.A. No. 80
	)	Shelby County
v.	)	Honorable W. Fred
	)	Axley, Judge
	)	(Contempt)
KATHRYN MAE SWISHER,	)	
	)	
Appellant	)	
	)	

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OPINION FILED: March 15, 1984
AFFIRMED

Joe D. Duncan
Judge

OPINION

The appellant, Kathryn Mae Swisher, was found guilty of contempt of court and was sentenced to ten (10) days in jail. The trial court suspended all but two (2) days of her sentence. She was also fined the sum of fifty dollars ($50).

In this appeal, the appellant contends the trial judge erred in failing to follow the procedures set forth in Tenn. R. Crim. P. 42, says the trial judge should have disqualified himself from hearing the case, alleges that the trial judge erred in not finding any intent by the appellant to disrupt the court proceedings, and complains about her sentence. We find no merit to these complaints.

In order to answer the appellant's specific complaints, a summary of some of the evidence and the proceedings in the trial court is necessary.

The record shows that the appellant

served as defense counsel for Herman Samuel Phillips, who had been indicted for aggravated rape, first degree burglary and larceny. Phillips' trial commenced on May 24, 1983, in the Shelby County Criminal Court, with the Honorable W. Fred Axley, presiding. During the course of his trial, the trial court admonished the appellant on several occasions to cease talking when the court was ruling on objections. At one point, out of the presence of the jury, the trial court specifically warned the appellant that a continuance of her interruptions would constitute contempt of court. Notwithstanding, when the jury returned to the courtroom, another interruption of some type was made by the appellant. The record shows that at that point the trial judge commented: "Ms. Swisher. Wait 'til I finish, please ma'am."

Later in the trial, as the jury was leaving the courtroom for a recess, the appellant asked her client in the presence of the court and at least some of the jurors: "How tall are you?" Her client answered, "Six, three," to which the appellant responded, "Six, three?" Regarding this particular incident, we note that at the contempt hearing on June 7, 1983, the trial judge pointed out that one of the issues in Phillips' trial was the height of the person who allegedly attacked the victim, and that it was apparent from the voir dire and other matters that the appellant's client did not intend to testify.

At any rate, subsequent to the appellant's misconduct mentioned above, the trial court advised her that a contempt hearing would be held, and that a hearing date would be set after the completion of her client's trial. She was advised by the trial court of her right to have counsel present and was told to either

obtain counsel or to represent herself.

Later, after the State had rested its case, the appellant apologized for her actions and said that she did not intend to cause any dispute with the court. She commented that "nothing was intentional" on her part. The trial court reiterated that the matter would be taken up at the conclusion of the trial.

Further, the record indicates that during the prosecuting attorney's argument to the jury, the appellant made some type of hand signals to the jury, and at one point rose to her feet and extended her arms, as if in a "crucifixion stance."

As previously mentioned, the trial court held a contempt hearing on June 7, 1983, at which hearing the appellant represented herself. The trial court reviewed with the appellant each of the particular matters that we have discussed above. The appellant addressed the court, stating that she "would like to deny all of it." She said her statement that she made when the

jury was filing out was "inadvertent." She specifically denied that she had ever made any "hand signals in front of the jury."

The trial judge concluded the hearing by finding that the appellant's actions during the trial were contemptuous, and accordingly found her guilty of contempt of court.

After the above proceedings, the appellant obtained counsel and he filed a "Motion For Certification Of Conduct Constituting Contempt And Rehearing." A hearing on this motion was held on June 15, 1983, and after an extended discussion of the matter between appellant's counsel and the trial court, the motion was denied.

The appellant's first complaint is that the trial court erred in failing to follow the mandates set forth in Tenn. R. Crim. P. 42. This rule provides:

(a) Summary Disposition.-A criminal Contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be

signed by the judge and entered of record.

(b) Disposition upon Notice and Hearing.-A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for preparation of the defense, and shall state the esssential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

The appellant argues that the trial court failed to follow the certification requirements of Rule 42 (a). There is no merit to this complaint because that section of the rule pertains only to summary dispositions of contempt matters. The appellant's contempt was not punished summarily. The present proceeding was conducted upon notice and hearing, as provided in Rule 42 (b).

The appellant further argues that the trial court did not comply with the notice requirements of Rule 42 (b).

As quoted above, Rule 42 (b) provides that the notice may be given "orally by the judge in open court in the presence of the defendant." As we set forth in our summary of the proceedings, the trial court advised the appellant in open court that a contempt hearing would be held following the trial. Also, during the trial, the appellant was advised that her continued interruptions of the court and her comment before the jury about her client's height constituted contempt. On May 26, 1983, a contempt hearing date was set for June 7, 1983. Thus, the appellant was adequately notified by these developments of the time and place of the hearing and the essential facts constituting these two (2) acts of contempt charged. It does appear that the appellant was first aprised [sic] at the June 7 hearing that her hand gestures before the jury also constituted

contemptible behavior. However, as previously indicated, her motion for a rehearing was held on June 15, 1983, at which time her counsel addressed the merits of the matter, offering explanations for the appellant's behavior. Further, the trial court at that time had before it a lengthy affidavit filed by the appellant explaining her behavior and her version of the events. After considering these matters, the trial court denied her motion for a rehearing.

Under all of the above circumstances, we find that the trial court substantially complied with the notice requirements of Rule 42 (b). Additionally, if the appellant's hand gestures before the jury were removed from consideration, the other instances of misconduct, of which she had actual notice prior to the June 7 hearing, would be sufficient to support the trial court's finding of contempt on her part. We find that the appellant received adequate notice and that no notice due process violation occurred.

Further, we do not view the appellant's

contemptuous acts as involving disrespect to or criticism of the trial judge; thus, Rule 42(b) did not require that the judge disqualify himself from hearing the matter. The record shows that the appellant did not object to Judge Axley presiding over the hearing. Further, we note that at the argument of this case the appellant's counsel stated tht he recognized that there was no merit to this complaint and that he no longer desired to pursue it.

Likewise, we find no merit to the appellant's complaint that the trial court failed to make an explicit finding of intent on her part to commit the acts which resulted in her conviction for contempt of court. The trial court stated in its order that it found that the appellant "willfully disregarded the orders of the court and in so doing disrupted the orderly business of this Court without reason or cause." This finding was more than sufficient to constitute a finding of intent on the part of the appellant.

Finally, the appellant complains that the punishment imposed upon her was excessive. We disagree. She was fined fifty dollars ($50.00) and sentenced to jail for ten (10) days. The punishment imposed is authorized by the penalty provisions of T.C.A. Sec. 29-9-103. Moreover, we note that the trial court suspended all but two (2) days of her sentence. The trial court did not abuse its discretion in fixing punishment in this case. See Wahlquist v. State, 213 Tenn. 626, 378 S.W.2d 742 (1964).

The judgment of the trail court is affirmed.

/Signed/ Joe D. Duncan, Judge

CONCUR:

/Signed/ Robert K. Dwyer, Judge

/Signed/ Jerry Scott, Judge

APPENDIX C

APPENDIX C

IN THE CRIMINAL COURT OF SHELBY COUNTY

AT MEMPHIS, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
VS.	)	Case No. 89571-2
	)	
KATHRYN MAE SWISHER,	)	
	)	
Defendant.	)	

CONTEMPT HEARING

THE HONORABLE W. FRED AXLEY, PRESIDING JUDGE

APPEARANCES

FOR THE STATE:

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FOR THE DEFENDANT:

KATHRYN MAE SWISHER
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IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

DIVISION VI

STATE OF TENNESSEE	)	
	)	
VS.	)	Case No. 89571-2
	)	
KATHRYN MAE SWISHER	)	

This cause came on to be heard and was heard on the 7th day of June, 1983 before the Honorable W. Fred Axley, Judge, holding the Criminal Court for Shelby County at Memphis, Tennessee and the following proceedings were had, to wit:

THE COURT: This is in cause number 89571 and 72 and it is the cause arising from a trial involving the defendant Herman Samuel Phillips. The attorney is Kathryn Mae Swisher, S-W-I-S-H-E-R. The hearing has to do with Contempt of Court.

Ms. Swisher, as I advised you before, I was going to have a hearing this morning and the Court will at this time advise you of what the

Court has found to be contemptuous in your manners and proceedings in the trial that I have just alluded to on the record.

Number one: During the course of the trial, the Court admonished you on numerous occasions not to override this Court while it was trying to rule on objections that were raised by the State. You refused to do so.

Number two: After the testimony of one of the fact witnesses placing at issue the height of the rapist in this cause, as the jury was filing out during a recess, and in the presence of at least five jurors, but in the absence of the Attorney General -- the Assistant Attorney General, you stood, faced your client, and in a loud voice which could be heard by the five jurors and the Court, asked your client, "How tall are you, six-three?" At which time your client replied in a loud voice, loud enough for the Court to hear and obviously the jurors, since they were in close proximity to this Court, your client replied, "Yes."

The Court was of the opinion at that time, based on your voir dire, and also the Court's personal knowledge of a prior conviction that your client had just a few months prior to this trial for burglary in the first degree [sic]. You had no intention of placing him on the witness stand. And the only way to get his actual height before this jury was something that the Court considered contemptuous.

First of all, you placed at issue something that was not placed in evidence by merely making statements in front of the jury, perhaps believing that it wasn't on the record. And yet, I might educate you a little bit that from prior experience, almost nine years as a trial counsel in the Criminal Courts, it is my feeling that when a Court takes a recess, until that last juror walks out of this room, that record should continue rolling. One of them may ask a question. Something may happen. In this case, it did. The Court considered that contemptuous.

Number three: During the rebuttal argument of the Assistant District Attorney and while that Assistant District Attorney's back was placed toward you, thus facing the jury, you made several hand signals to the jury. Very difficult to describe. I will try. One of which was to place the thumb and first finger together in a circle with the other three extended straight up in this manner--(Indicating)--among other hand signals to the jury.

And at one point actually rose to your feet, stood silently for several seconds, with your arms extended from your side as if in a crucifixion stance. This also was observed by the Court.

Now, I will ask you if you have anything that you would like to address the Court on at this time.

MS. SWISHER: I would like to deny all of it.

There was a statement made when the jury

was filing out that was inadvertent. Now, it is my custom to stand and have my client stand when a jury files out, out of respect to the jury.

There is also my custom to have my client write me the information that he would like to talk to me about on cards so that he does not break my concentration.

Now, that day I had noticed the State, as she was accustomed to doing, leaving. I am in a heightened state of consciousness during a trial and very little escapes what happens. My client handed me the card and what took place was not a question. It was an exclamation. And the exclamation was: How tall are you, which is different than the How tall are you. It was not a question, because he had given me an answer written on the card, being six-three.

He may or may not have replied loud enough for the tape or anything else, because at that point, you cut in. Now, if that was heard by the jury, there should have been a hearing then. And there should have been a mistrial

called then.

Now, anything else I totally deny. I have No, never made hand signals in front of a jury nor would I.

There is a philosophy which is called Moral Relativism. I do not believe in it. I believe that it is inherently evil to do evil in the good -- name of good. It doesn't work and I would never do anything in this courtroom which was unethical.

THE COURT: You brought up an interesting question, Ms. Swisher, regarding ethics and the Code of Professional Responsibility. The Code of Professional Responsibility, Rule Eight, Disciplinary Rule DR-7-106 regarding professional conduct: "In appearing in one's professional capacity before a Tribunal, a lawyer shall not, one, state or allude in any [sic] that he or she has no reasonable basis to believe that it is relevant to the case or--" this is here I place my emphasis"-- that will not be supported by

"admissible evidence."

To make statements outside the record, when a man is not placed on the witness stand on his own behalf, under oath, is obviously exactly what I am talking about. I did not address myself to the Code of Professional Responsibility. That is another board.

I do address myself to the conduct of lawyers in this courtroom. This Court commands respect. I will get it from lawyers one way or another. They may try me out from time to time. The consequences are up to them.

After reviewing the matter, after reflecting on it since the day I advised you that we would address the issues of Contempt of Court, but for the reasons I have just stated to you, the Court does hereby find you, Kathryn Mae Swisher, guilty of Contempt of Court and fix [sic] your punishment at a fine of fifty dollars and confinement in the Shelby County Jail for ten days. I will further suspend two of those days and I will allow you to serve your sentence

this coming weekend, taking you into custody at seven o'clock a.m. on Saturday, you will be released on Monday morning, June 13 at seven o'clock a.m.

I hereby assess the cost of this prosecution against you.

(End of requested hearing.)

CERTIFICATE

I, the undersigned Tammy Parker, Official Court Reporter for the Fifteenth Judicial Circuit of the State of Tennessee, do hereby certify the foregoing to be true, accurate, and complete transcript of all proceedings had in the hearing of the captioned cause in the Criminal Court for Shelby County, Tennessee, on the 7th day June, 1983.

I do further certify that I am neither of kin, counsel not [sic] interest to any party hereto.

Dated this 7th day of June, 1983

/signed/ Tammy Parker

APPENDIX D

APPENDIX D

IN THE CRIMINAL COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE

STATE OF TENNESSEE, Plaintiff,	)	
vs.	)	CASE NO. B-89571 B-89572
HERMAN SAMUEL PHILLIPS Defendant.	)	

EXCERPTS
FROM TRIAL
Second Day, May 24, 1983

THE HONORABLE W. FRED AXLEY, PRESIDING JUDGE

FOR THE STATE:

Ms. Veronica Coleman
Assistant District Attorney General
Shelby County Attorney General's Office
201 Poplar Avenue
Memphis, Tennessee 38103

FOR THE DEFENDANT:

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Nancy Claypool
Official Court Reporter
Fifteenth Judicial Circuit

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

DIVISION VI

STATE OF TENNESSEE, Plaintiff, vs. HERMAN SAMUEL PHILLIPS, Defendant.	)	CASE NO. B-89571 B-89572

Excerpt No. 1, May 24, 1983

(WHEREUPON, during the testimony and proceedings in the examination of JAMES LEROY CAMPBELL the following was had:)

(LAST QUESTION AND ANSWER IN

DIRECT EXAMINATION BY MS. COLEMAN:)

Q Were there other members of her family present?

A Yes, ma'am. I think her mother, sister, and her brother or cousin. Approximately four or five members of her family were present.

MS. COLEMAN: I'll pass the witness at this time.

THE COURT : You may cross-examine, Ms.

Swisher.

CROSS-EXAMINATION

BY MS. SWISHER :

Q She didn't mention voice?

A Did she mention what?

Q Voice.

A Voice? Now, what are you referring to when you said did she mention voice?

Q You said she mentioned odor, smell. Did she mention sounds?

A No, she didn't.

Q No mention of sound?

A No.

Q Nothing that said she--

A There were sounds made, which were sounds that he uttered to her, but when you said "voices" are you talking about tone or what?

Q Well, that's for you to answer.

A Well, I don't know what you asked me, what you want answered.

THE COURT: Be specific--

Q (By Ms. Swisher) I don't know what she

said to you.

THE COURT: Ms. Swisher, I'm talking to you.

Ladies and gentlemen, do not discuss the case among yourselves or allow anyone to discuss it with you all. I'll ask you to step out for just a few minutes.

(WHEREUPON, the jury retired from open court and the following proceedings were had out of its presence:)

THE COURT: Ms. Swisher, when I talk to you I expect you to be quiet. It's just that simple.

MS. SWISHER: Your Honor, I asked a question but I had not led him on. That's the proper way to ask questions, is to not ask leading questions. And the objection would have asked me to lead the witness, which I'm not supposed to do.

THE COURT: I'm not talking about an objection. I'm talking about the fact that when the Court addresses you, you stop talking. Whatever you're saying, you stop talking.

MS. SWISHER: I will try to be more

careful about that. I didn't mean to be rude.

THE COURT: This is the Court's second warning. I will not warn you again. We're going to try this case and we're going to try it as unemotionally as we can. And if you're doing something that the Court wants to prevent you from doing, just my addressing you, no matter what it is, you will stop talking when I begin talking, when you hear the sound of my voice. God gave you two ears, and I know you can hear well. You will stop whatever you're saying.

If there is an objection, you will stop talking until I find out what the objection is.

MS. SWISHER: Well, Your Honor, I apologize---

THE COURT: I am talking at this time, Ms. Swisher, and you're beginning to interrupt me again. Now, perhaps you will just seat yourself until I finish talking. Maybe that will help you out a little bit.

As to the State, the same thing goes to you. If Ms. Swisher objects, I expect you to

stop what you're doing until I find out what the objection is. Remain quiet until I rule on it.

Now, Ms. Swisher, do you have a problem with this?

MS. SWISHER: Your Honor -- May I stand when I --

THE COURT: You may stand, now, and I'll listen to you.

MS. SWISHER: I am anticipating what you are going to say and trying to correct it. My mind is in a pattern that should not be interrupted, because that's just the way the mind works.

THE COURT: You do understand I'll interrupt you when I get ready to, don't you?

MS. SWISHER: I understand that. I'm not doing it out of disrespect. I'm doing it out of concentration.

THE COURT: That can cost you money and jail time, Ms. Swisher, in this courtroom. That's called contempt. Now, if you need a recess, if you need to settle down a little bit,

I'll give you one. If you don't, we're going to call the jury back in and finish this trial. What's your pleasure, Ms. Swisher?

MS. SWISHER: I didn't understand what you just said to me.

THE COURT: Do you need a recess?

MS. SWISHER: No, I don't.

THE COURT: To settle down?

MS. SWISHER: Certainly not.

THE COURT: Are you ready to resume the trial?

MS. SWISHER: Yes, I am.

THE COURT: All right. Bring in the jury.

(WHEREUPON, a pause of approximately two minutes ensued on the record, during which the jury made its appearance and seated itself in the jury box.)

Q (By Ms. Swisher) Now, Officer Campbell--

THE COURT: Ms. Swisher. Wait 'til I finish, please ma'am. Do you need a recess?

MS. SWISHER: No. Certainly not.

THE COURT: All right. You may proceed.

(CROSS-EXAMINATION RESUMED

BY MS. SWISHER:)

Q Now, Officer Campbell, do you remember about what time it was when you arrived there?

A Approximately zero six twenty hours in the morning.

--END OF REQUESTED EXCERPT FROM PROCEEDINGS--

Excerpt No. 2, May 24, 1983

(WHEREFORE, after the examination of the witness James Leroy Campbell was concluded, the following was had:)

THE COURT: Ladies and gentlemen, we've been going for aboout an hour or so here, so I'm going to give you about a ten minute break. Do not discuss the case among yourselves or allow anyone to discuss it with you. You may step out at this time.

(WHEREUPON, the jury began retiring from open court.)

MS. SWISHER: How tall are you?

THE DEFENDANT: Six, three.

MS. SWISHER: Six, three?

(WHEREUPON, the final jurors departed from the courtroom, and the following was had out of the presence and hearing of the jury:)

THE COURT: Ms. Swisher, do not discuss this case in front of the jury when we are asking them to step out.

Mr. Deputy, step out and get the State. I want a representative of the State in this courtroom.

(Pause)

Ms. Coleman, in your absence, as the jury was filing out, Ms. Swisher turned to her client and asked him how tall he was. He answered. He obviously was not on the stand. I want you here as a representative of the State.

Ms. Swisher, stand please.

(WHEREUPON, Ms. Swisher stood.)

Ms. Swisher, in this Court's opinion, that is possibly the worst example of an officer of this court or any member of the bar that I've ever seen in my ten years of the practice of law.

I'm going to defer to the end of this trial a contempt of court. I will state that you have a right to an attorney. I will set a date for a contempt of court hearing as soon as this case is over with. I will give you a date, and I expect you to have counsel or represent yourself.

You may be seated.

MS. SWISHER: Your Honor--

THE COURT: Anything you say will be

held aganist you in a contempt hearing. Now you stand at your own risk. What do you have to say?

MS. SWISHER: My client was passing me a card. I didn't ask him. He handed it to me.

THE COURT: Do you want to hear it played back?

(Pause) Do you want to hear it played back?

MS. SWISHER: Hear what?

THE COURT: As far as your remarks, do you want to hear it played back?

MS. SWISHER: I was not even looking at the jury at that time.

THE COURT: As an officer of the court you're supposed to be looking at the jury.

MS. SWISHER: Your Honor, the State had already left the courtroom.

THE COURT: It is a violation of your oath of office and the canons of office.

MS. SWISHER: I did not intentionally violate anything, and I think that you know that.

THE COURT: No, ma'am, I don't. Now, you may continue to argue. I told you you continue at your own risk. You're on your own, Ms. Swisher.

MS. SWISHER: I have always been on my own.

THE COURT: The court take a recess.

(WHEREUPON, a recess was had.)

THE COURT: All right. Mr. Phillips is present. Is the defense ready?

MS. SWISHER: Yes.

THE COURT: Is the State ready?

MS. COLEMAN: Yes.

THE COURT: Bring in the jury.

(WHEREUPON, the jury returned to open court and the following proceedings were had in its presence:)

THE COURT: All right. Call your next witness.

THE STATE: I'd like to call Jo Jones.

--------END OF REQUESTED EXCERPT----------

Excerpt No. 3, May 24, 1983

THE COURT: Ms. Coleman.

MS. COLEMAN: Yes. At this time the State will rest its case in chief.

THE COURT: All right. Ladies and Gentlemen, I'm going to put you to bed.

(WHEREUPON, the jury laughed.)

You can watch TV within my limits. Sounds almost like a dictator, I tell you what you can watch.

(WHEREUPON, the jury laughed.)

I don't even know what's on. No detective, police stories, and all that kind of stuff, you know. We want you to decide this case on what you hear in the courtroom, not what you're going to see on some silly show where they dictate the outcome because they can change names and plots and so forth.

Obivously, do not discuss the case among yourselves or allow anyone to discuss it with you. Take your night with as much enjoyment as you can. I'll have you back up here by 10:00 in the morning, because I've got a full calendar I've got to dispose of before I ever see you.

All right. Good night. You may step out.

(WHEREUPON, the jury departed from open court and the following proceedings were had:)

THE COURT: I'd like to compliment both sides for working hard for me today, and for that jury.

Any motions?

(WHEREFORE, Ms. Swisher made a Motion for Judgment of Acquittal. The Judge denied said motion, and Ms. Swisher stated her exception to his ruling.)

THE COURT: Yes ma'am?

MS. SWISHER: Excuse me. I would like to apologize for any--anything that happened this afternoon. It certainly was not any intention on my part to cause any dispute with the Bench. I just wouldn't do that. And nothing was intentional on my part with you.

THE COURT: Well, there's no dispute with the Court. And as I advised you, Ms. Swisher, we will not take that matter up until the conclusion of the trial.

All right. Let's adjourn court until 9:30 in the morning.

(WHEREUPON, the court was adjourned (approx. 8:00 P.M.) until 9:30 the following morning.)

---------END OF REQUESTED EXCERPT----------

CERTIFICATE

I, the undersigned Nancy Claypool, Official Criminal Court Reporter for the Fifteenth Judicial Circuit of the State of Tennessee, do hereby certify that the foregoing is a true, accurate and complete transcript of the proceedings requested namely: Excerpt No. 1, an out-of-jury conference during the examination of witness Campbell; Excerpt No. 2, incident as the jury was retiring from court; and Excerpt No. 3, Remarks of the Court to the jury at end of the day; all on the Second Day of the trial of captioned cause, May 24, 1983.

I do further certify that I am neither kin, counsel nor interest to any party hereto.

June 6, 1983

/signed/ Nancy Claypool
Court Reporter

(2)

No. 84-416

Supreme Court, U.S.
FILED
DEC 1 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

KATHRYN MAE SWISHER,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

On the Petition for the Writ of Certiorari
to the Tennessee Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Tennessee Court of Criminal Appeals in the instant case is unpublished and appears in the appendix to petitioner's petition for writ of certiorari to this Court. The Tennessee Supreme Court's denial of permission to appeal the decision of the intermediate appellate court is unpublished and appears in the appendix to petitioner's petition for writ of certiorari to this court.

JURISDICTION

The petitioner seeks review pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

The petitioner essentially presents the following questions for review:

I. Whether the contumacious behavior of the petitioner involved disrespect to or criticism of the trial court which should have prompted the trial court to recuse itself, in accordance with Rule 42(b), Tennessee Rules of Criminal Procedure, from the hearing on the contempt charges, and whether the trial court's failure to recuse itself violated the petitioner's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether the petitioner was deprived of notice of the contumacious behavior with which she was charged, in violation of the petitioner's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Fifth Amendment to the United States Constitution:

> . . . [N]or [shall any person] be deprived of life, liberty, or property, without due process of law. . .

2. Fourteenth Amendment to the United States Constitution:

> . . .[N]or shall any state deprive any person, life, liberty, or property, without due process of law. . .

3. Rule 42, Tennessee Rules of Criminal Procedure: Criminal Contempt:

> (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the district attorney general or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

STATEMENT OF THE CASE

On November 9, 1982, the Shelby County Grand Jury returned two indictments against Herman Samuel Phillips, Jr., charging him with aggravated rape and first degree burglary and larceny. The petitioner was counsel of record for Phillips, and Phillips' trial was ongoing on May 24, 1983. During cross-examination of State's witness law enforcement officer James Leroy Campbell by petitioner, petitioner asked the witness if a certain individual [presumably the prosecutrix] had mentioned certain sounds being made by the perpetrator during the rape. Officer Campbell responded that he did not understand the question. The court then began to direct the petitioner to reformulate her question to make it more specific. Before the direction was stated, petitioner interrupted the trial judge, stating to Officer Campbell "I don't know what she said to you". (Appendix D to petitioner's petition for writ of certiorari).

At that point, the trial judge excused the jury from the courtroom and gave what the judge described as a second warning to petitioner not to continue speaking once the court had begun to address her. The trial court indicated that the rule of courtroom decorum applied equally well to the assistant district attorney general prosecuting the case. During the course of the trial judge's admonition to petitioner, the petitioner again interrupted him, and was issued still another, her third, warning. (Appendix D to petitioner's petition for writ of certiorari).

Following the court's warning, petitioner explained that her behavior was the result of concentration, and not disrespect. At that point, the trial judge specifically indicated that a continuation of the interruptions would constitute contempt of court. The court offered petitioner an opportunity to take a recess for the purpose of "settling down" if she needed it. Petitioner declined the offer. (Appendix D to the petition for writ of certiorari).

After the jury returned to the courtroom, the trial judge was again interrupted by the petitioner, who apparently renewed her cross-examination of the police officer prior to the trial judge having an opportunity to complete his determination that all of the correct jurors had returned to the courtroom. After politely requesting counsel to wait until he had finished, the trial judge reiterated that the petitioner could have a recess if one was needed, but the offer was again declined. (Appendix D to petitioner's petition for writ of certiorari).

Following the cross-examination of Officer Campbell, which continued for approximately an hour, the court ordered a ten minute recess. As the jury was retiring, but before all of them had left the courtroom, petitioner loudly asked her client how tall he was. He responded that he was 6 foot 3 inches in height. At that point, the trial judge directed the petitioner not to discuss the case in front of the retiring jurors, and ordered the courtroom deputy to have the assistant district attorney general returned to the courtroom. (Appendix D to petitioner's petition for writ of certiorari).

The trial court then had directed the petitioner to stand and advised her that a contempt of court hearing would be held and that the date for the hearing would be set as soon as the underlying criminal trial was completed. Petitioner was advised of her right to have counsel present and was told to either obtain counsel for the hearing or to represent herself. She was further informed that anything she said in response to the court's notification of the hearing would be held against her. Petitioner then explained that her client had handed her a card, apparently positing that what had appeared to be a question regarding her client's height had instead been an exclamation over the contents of the card. Following a brief further discussion and a recess, the Phillips' trial recommenced. (Appendix D, petitioner's petition for writ of certiorari).

Subsequently, the State rested its case-in-chief and the jury was dismissed for the night. Following the denial of the defendant's motion for judgment of acquittal, the petitioner apologized to the court for her previous conduct. The trial court reiterated that the matter of contempt would be taken up at the conclusion of the trial. (Appendix D, petitioner's petition for writ of certiorari). At the conclusion of the trial on May 26, 1983, the hearing on the contempt charges was scheduled for June 7, 1983.

On June 7, 1983, a hearing was held on the issue of contempt. Initially, the trial court advised the defendant of the conduct which had been considered to constitute contempt. That conduct was:

> (I) Her refusal to heed numerous admonitions not to override the court as the court attempted to rule on the State's objection;
>
> (II) The fact that following the testimony of a fact witness regarding the rapist's height, as the jury was leaving for a recess but while at least five jurors remained in the courtroom, petitioner stood facing her client and loudly asked

him his height, saying "How tall are you, six three?". The court noted that her client responded loudly in the affirmative, and also noted that that exchange had occurred in close proximity to the jurors. The judge stated that the remarks were particularly significant since it was apparent from voir dire and from the defendant's past record that the defendant would not take the stand and that his actual height would, therefore, not have been presented to the jury by any proper means;

(III) And, during the State's closing argument in rebuttal, petitioner, who was facing the jury, made several hand signals to the jury, and on one occasion stood silently for several second with her arms extended in a crucifixion stance. (Appendix C, petitioner's petition for writ of certiorari).

Following the explanation of the factual bases for the contempt hearing, the trial court asked petitioner if she wished to address the court. In response, petitioner made a general denial of misconduct and a specific denial of having made any hand signals. With respect to the statement about height, she asserted that it was inadvertent and arose out of her normal practice of having her client stand as the jury left the courtroom, and having her client's write on cards any information they wanted to discuss with her to preserve her concentration. Petitioner further stated that her remark about her client's height was an exclamation made upon reading such a card, as opposed to an inquiry of him regarding his height. (Appendix C, petitioner's petition for writ of certiorari).

Thereafter the trial court found the petitioner quilty of contempt of court, and fixed her punishment at a fine of fifty ($50.00) dollars and ten (10) days in jail, with all but two (2) days being suspended and with permission granted to serve the time on designated weekend. (Appendix C, petitioner's petition for writ of certiorari).

On June 10, 1983, the petitioner filed a Motion to Reconsider and Set Aside Judgment of Conviction for Contempt or to Reduce Punishment Prescribed. The motion was filed on behalf of the petitioner by counsel. A hearing on the motion was set for June 13, 1983, but on application of the petitioner, the cause was reset to June 15, 1983. On June 13, 1983, an order was entered allowing the petitioner to review tape recordings of the court proceedings at which the behavior which was the subject of the contempt action occurred.

On June 15, 1983, an affidavit of the petitioner was filed on her behalf. On the same date, petitioner filed a Motion for Certification of Conduct Constituting Contempt and Rehearing. A hearing was conducted on June 15, 1983. Counsel for petitioner stated that he had filed the Motion for Certification of Conduct pursuant to Rule 42(a), Tennessee Rules of Criminal Procedure. He explained the grounds for the motion and the petitioner's position on the conduct which was the basis for the finding of contempt. Thereafter, the trial court denied the Motion for Certification and Rehearing, explaining in detail his finding of contempt. In lieu of bond, the defendant was released on her own recognizance.

On June 15, 1983, the defendant filed her notice of appeal to the Court of Criminal Appeals of Tennessee. On March 15, 1984, following briefing and oral argument of the case, that court issued an opinion affirming the decision of the trial court. (Appendix B, petitioner's petition for writ of certiorari). The petitioner sought permission to appeal the decision of the intermediate appellate court to the Tennessee Supreme Court. On June 4, 1984, permission to appeal was denied by *per curiam* order of the State Supreme Court. (Appendix A, petitioner's petition for writ of certiorari).

REASONS FOR DENYING THE WRIT

The respondent insists that the instant petition for writ of certiorari should be denied since the judgment of the Tennessee Court of Criminal Appeals in the present case does not involve any federal question of substance, not heretofore determined by this Court, or not decided in accordance with applicable decisions of this Court. *See* Supreme Court Rule 17.1.

There being no special and important reasons for the granting of certiorari in this case, the Court should, in its sound judicial discretion, deny the writ sought here.

A.

In the first question presented to this Court by petitioner, petitioner contends that she was denied due process when the trial judge erred in not recusing himself pursuant to rule 42(b), Tennessee Rules of Criminal Procedure, which provides for recusal from a hearing on criminal contempt if the contumacious behavior involves disrespect to or criticism of the trial judge.

The Tennessee Court of Criminal Appeals found as follows on this issue:

> Further, we do not view the appellant's contemptuous acts as involving disrespect or criticism of the trial judge; thus, Rule 42(b) did not require that the judge disqualify himself from hearing the matter. The record shows that the appellant did not object to Judge Axley presiding over the hearing. Further, we note that at the argument of this case the appellant's counsel stated that he recognized that there was no merit to this complaint and that he no longer desired to pursue it.

(Appendix B, pages 10, 11, appendix to petition for writ of certiorari). The respondent contends that the Tennessee courts correctly concluded that the petitioner's conduct in interrupting

the trial judge did not constitute the kind of disrespect or criticism contemplated by Rule 42(b), Tennessee Rules of Criminal Procedure. The relevant behavior of petitioner involved her repeated interruptions of the trial judge as he attempted to rule on objections made by the State.

It is clear from the reading of the record (Appendix D to petition for the writ of certiorari) that the contumacious conduct arose from an improper overzealousness in the respresentation of her client, and not from any design to impugn the integrity, ability, or authority of the trial judge. This interpretation is entirely consistent with petitioner's explanation to the trial court that her conduct resulted from concentration and not from disrespect. (Appendix D, page 28, petition for writ of certiorari). Since the petitioner's improper conduct was not a personal attack on the trial judge, the Court of Criminal Appeals correctly found that he was not required to recuse himself.

The requirement of disqualification appears to be a flexible one which is committed to the sound discretion of the trial judge. *See Cooke v. United States,* 267 U.S. 517, 539, 45 S.Ct. 390, 396, 69 L.Ed. 767 (1925) (cited in Notes of Advisory Committed of Rules, Rule 42, Federal Rules of Criminal Procedure, after which Rule 42, Tennessee Rules of Criminal Procedure, is patterned). The cases in which an abuse of that discretion have been found, relied upon by the petitioner, unfailingly involves situations which a trial court was the victim of personal attacks or innuendos and/or engaged in prolonged or repeated verbal wrangling with the contemptor. *See Offut v. United States,* 348 U.S. 11, 99 L.Ed. 11, 75 S.Ct. 11 (1954); *United States v. Combs,* 390 F.2d 426 (6th Cir. 1968); *Cooke v. United States, supra.*

In the case at bar, there is no reasonable way the petitioner's conduct can be characterized as demonstrating animosity toward the trial judge. Moreover, one must reach equally far to contend that the trial judge treated the interruptions as personal

attacks upon him at the expense of conventional judicial demeanor. Clearly, the Tennessee courts were correct in determining that the trial judge did not err in failing to recuse himself, and the petitioner was not thereby denied due process.

Finally, the Court of Criminal Appeals correctly noted that Rule 42(b), Tennessee Rules of Criminal Procedure provides for disqualification in appropriate circumstances except where the contemptor consents that the trial judge preside. Significantly, in the case at bar, at no time prior to the adjudication of contempt on June 7, 1983, did the petitioner object to the trial judge presiding over the contempt hearing.

Thus, the respondent contends that the state courts have correctly concluded that the trial judge did not err in not recusing himself, and the petitioner has therefore not been denied due process.

B.

The petitioner also contends that she was denied due process because the trial judge failed to notify her of all the conduct which was to be considered at the contempt hearing.

The petitioner contends that the trial judge deprived her of due process by failing to provide her with a certification of personal observation of the contumacious conduct. However, as the Court of Criminal Appeals of Tennessee correctly concluded, such a certification is required only when the contempt is punished summarily, and the petitioner's contempt was not punished summarily since it was conducted upon notice and hearing, as provided in Rule 42(b). (Appendix B at page 8, appendix to petition for writ of certiorari). Since the petitioner's contempt proceeding was not disposed of summarily, the authority relied upon by the petitioner, *Taylor v. Hayes,* 418 U.S. 483, 489, 94 S.Ct. 2697, 2703, 41 L.Ed.2d 897 (1974), is not applicable, since the adjudication of contempt in that case was made summarily, the defendant having been ordered not to

speak in his defense and having been threatened with being gagged.

As set forth in the statement of the case hereinabove, the adjudication of contempt with respect to the petitioner was made after explicit notice, delay for preparation, a hearing, and an additional hearing on post-adjudication motions. Clearly, the petitioner cannot be said to have been denied due process.

Thus, the respondent contends that the Tennessee courts were correct in concluding that the trial judge provided the petitioner with adequate notice and hearing with respect to the charge of criminal contempt.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that the petition for the writ of certiorari be DENIED.

Respectfully submitted,

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